

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Orig. with affidavit of mailing

75-1136

To be argued by
JOAN S. O'BRIEN

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**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 75-1136

UNITED STATES OF AMERICA,

—against—

Appellee,

THOMAS MURPHY and ROBERT WIDMAN,

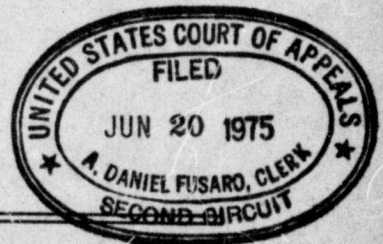
Appellants,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

PAUL B. BERGMAN
JOAN S. O'BRIEN,
*Assistant United States Attorneys,
Of Counsel.*



4

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	2
ARGUMENT:	
POINT I—Government's Exhibits 5G and 5H, shown to the jury, did not violate appellant Murphy's right to a fair trial	24
POINT II—Evidence of appellant Murphy's dominion over the 1965 Cadillac and his Hawaiian vacation was properly allowed	28
POINT III—The in-court identification of appellant Widman was not based on impermissible pre-trial procedures	29
CONCLUSION	35

TABLE OF AUTHORITIES

Cases:

<i>Clemmons v. United States</i> , 408 F.2d 1230 (D.C. Cir. 1968), <i>cert. denied</i> , 394 U.S. 964 (1969)	24
<i>Gilbert v. California</i> , 388 U.S. 263 (1967)	24
<i>Neil v. Biggers</i> , 409 U.S. 188 (1972)	30
<i>United States v. Abbate</i> , 451 F.2d 990 (2d Cir. 1971)	24
<i>United States v. Barnes</i> , 365 F.2d 509 (D.C. Cir. 1966)	24, 27
<i>United States v. Calarco</i> , 424 F.2d 657 (2d Cir.), <i>cert. denied</i> , 400 U.S. 824 (1970)	25

	PAGE
<i>United States v. DeSena</i> , 490 F.2d 692 (2d Cir. 1973)	24, 25
<i>United States v. Evans</i> , 484 F.2d 1178 (2d Cir. 1973)	20, 27, 30
<i>United States v. Fernandez II</i> , 480 F.2d 726 (2d Cir. 1973)	30
<i>United States v. Fisher</i> , 455 F.2d 1101 (2d Cir. 1972) ..	29
<i>United States v. Forzano</i> , 190 F.2d 687 (2d Cir. 1951) ..	24
<i>United States v. Harmon</i> , 349 F.2d 316 (4th Cir. 1965)	25
<i>United States v. Harrington</i> , 490 F.2d 487 (2d Cir. 1973)	24, 25 26
<i>United States v. Messina</i> , 507 F.2d 73 (2d Cir. 1974)	30, 31
<i>United States v. Miller</i> , 381 F.2d 529 (2d Cir. 1967)	24
<i>United States ex rel. Phipps v. Follette</i> , 428 F.2d 912 (2d Cir.), cert. denied, 400 U.S. 908 (1970)	30
<i>United States v. Ravich</i> , 421 F.2d 1196 (2d Cir.), cert. denied, 400 U.S. 834 (1970)	29
<i>United States v. Reed</i> , 376 F.2d 226 (7th Cir. 1967) ..	25, 27
<i>United States v. Reid</i> , — F.2d —, slip op. 3073, (2d Cir., April 24, 1975)	30, 31, 32, 34
<i>United States v. Sacasas</i> , 381 F.2d 451 (2d Cir. 1967) ..	24
<i>United States v. Trudo</i> , 449 F.2d 649 (2d Cir. 1971), cert. denied, 405 U.S. 926 (1972)	29
<i>United States v. Yanishefsky</i> , 500 F.2d 1327 (2d Cir. 1974)	30

OTHER AUTHORITIES

4 Wigmore, <i>Evidence</i> (3rd Ed. 1940) § 1130	24
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**United States Court of Appeals
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Docket No. 75-1136

UNITED STATES OF AMERICA,

Appellee,

—against—

THOMAS MURPHY and ROBERT WIDMAN,

Appellants,

BRIEF FOR THE APPELLEE

Preliminary Statement

Robert Widman and Thomas Murphy appeal from a judgment, after trial by jury in the United States District Court for the Eastern District of New York (Mishler, *Ch. J.*) convicting each of them on April 4, 1975 on Count II¹ charging them with armed bank robbery in violation of Title 18, United States Code, Section 2113(d) and Count III charging them with the conspiracy to commit bank robbery under Title 18, United States Code, Section 371. On Count II, each appellant was sentenced to a 15 year term of imprisonment and on Count III each appellant was sentenced to a five year term of imprisonment to run concurrent with

¹ Since the jury found each appellant guilty of the armed bank robbery, the Court did not allow them to deliberate on Count I, the lesser included offense of bank robbery under Title 18, United States Code, Section 2113(a).

Count II, both terms imposed pursuant to Title 18, United States Code, Section 4208(a)(2). Both appellants are presently incarcerated.

On appeal, the appellant Murphy argues as error the admission into evidence of the redacted "mug shot" of him which was part of a photographic spread and the admission into evidence of the documentation and appellant's statements about his sudden trip to Hawaii four days after the bank robbery.

On appeal, appellant Widman argues as error the in-court identification made of him as being the product of impermissibly suggestive pre-trial identification procedures.

Statement of Facts

A. The robbery and investigation

On May 9, 1974, at approximately 8:30 A.M. before banking hours, the employees of the Chase Manhattan Bank at 190-12 Jamaica Avenue, Hollis, New York were robbed at gunpoint by two individuals (23-24, 51-53, 70-74, 92-97, 165-168, 246-252).² One man was uniformly described as being tall, heavyset with light colored hair wearing plastic gloves and carrying a small black gun (24, 52, 72, 98-99, 248-252). The second man was shorter with a smaller frame, long dark hair and a moustache (53, 73, 93). Both men had handkerchiefs in front of their faces for most of the time (53, 71-73) but the shorter man dropped his handkerchief as he was taking money from the tellers' buggies (104-105, 168, 253). The unrecovered loss to the federally insured bank due to this robbery was \$73,594 (36, 465).

² Numerals in parentheses refer to pages of the trial transcript and numerals preceded by S.H. refer to the pages of the suppression hearing transcript.

The F.B.I. immediately conducted a neighborhood investigation in the vicinity of the bank. One Plinio Medina, manager of a supermarket across the street from the bank, informed the F.B.I. that on three consecutive days prior to the robbery, on May 6, 7, and 8, 1974, he observed a blue Cadillac parked opposite the bank at approximately 7:45 to 8:00 A.M. each morning.³ He observed the license plate one time and on the day of the robbery he gave the F.B.I. two alternative numbers for the plate number, one of which was 511SSF (291, 293).⁴ He further informed the F.B.I. that on each day he observed the same three men in this car and on the second day one was taking notes (287-289).

License plate number 511SSF was in fact registered to a 1965 blue Cadillac for a Thomas Murphy at 91 Marcus Avenue, New Hyde Park, New York (400-401). At 1:00 P.M. on the same day of the robbery F.B.I. Agent Steven Carbone conducted a surveillance at 91 Marcus Avenue until 5:00 P.M. that evening. During this surveillance Agent Carbone observed a brown Buick Skylark convertible, license number 626QIJ parked in the driveway of the 91 Marcus Avenue address (209). It was later learned that this Skylark convertible was one which appellant Widman was seen on occasions driving.⁵

³ Mr. Medina's attention was drawn to this car when one individual, subsequently identified as appellant Widman, made a remark to a girl whom Medina drove to work (287-288; S.H. 159-160).

⁴ Mr. Medina was sure that the last three characters of the second number given the F.B.I. were SSF, but not of the first three digits. He recalled that the second and third numbers preceding the SSF were the same (291).

⁵ A defense witness, John Mullane, testified that appellant Widman drove a tan Buick convertible (439-440). License number 626QIJ was registered to appellant's father "William Widman" at 254-12 74th Avenue, Glen Oaks, the address of the appellant. This license was registered to a Cadillac however and not a Buick. A tan 1965 Buick convertible was also registered to "William A.

[Footnote continued on following page]

On May 13, 1974, the F.B.I. showed to witnesses a photographic spread of six photos, one of which was a 1970 photograph of appellant Murphy with long hair and a moustache (118; Government Exhibits 5A-5F; 5A).⁶ At that time (and at trial) bank employees Alice DiChiara (112-116), Lottie Hoggard (170-172), and Joseph Leader (256-258) selected, with varying degrees of certainty, the photograph of Thomas Murphy (Exhibit 5A) as the shorter, dark haired robber.

On July 10, 1974, F.B.I. Agent Steven Carbone arrested appellant Thomas Murphy at his residence 91 Marcus Avenue, New Hyde Park, New York. After proper warnings were given to appellant Murphy, and his signing of the F.B.I. waiver of rights form (212-214), Thomas Murphy made several statements. He admitted to owning a 1965 blue Cadillac, licence plate 511SSF which he did not allow anyone other than his wife to operate (215-216). He further told the agent that he had been unemployed for the last six months, having been previously employed by the O & C Cab Company (216). Despite his recent history of unemployment, he stated that he had travelled with his wife to Honolulu, Hawaii in May, 1974 and to Paradise Island in the Bahamas in June of 1974 (215-216).

Widman" at 254-12 74th Street, Glen Oaks, New York but with a different license number, 953QWZ (401-403). On a subsequent surveillance on October 2, 1974 Agent Carbone observed the same car with license number 683QMN (407-408). This license was registered to a Mercury at the same address, 254-12 74th Avenue, Glen Oaks, New York to one "Theresa A. Widman" (403). Apparently, someone at the Widman residence often changed the license plates on this car.

⁶ Photographic spread, Government Exhibits 5A-5F with two substituted photographs, Government Exhibits 5G and 5H, will be present in court at the time of the oral argument. The back of Government Exhibit 5A, which was not submitted to the jury, indicates that this photo was shown to bank witnesses on May 13, 1974.

At the time of his arrest, Thomas Murphy had a faint growth of hair above the lip and a shorter hair style. A new photographic spread of six photographs (Government Exhibits 4A-4F), with Murphy's new appearance (Government Exhibit 4A) was shown to the witnesses Hoggard and Leader, but they failed to identify anyone (S.H. 98; 155).⁷

Subsequent investigation revealed that records of the Ilikai Hotel in Honolulu, Hawaii indicated that "Thomas Murphy", at "91 Marcus Avenue, New Hyde Park, New York," employed by the "O & C Cab Company" travelling with a "Robert Hoffman" at "254-75 74th Avenue, Glen Oaks, New York" employed by the "O & S Cab Company" registered at the hotel on May 13, 1974 and departed on May 17, 1974 (186-198). Long distance phone calls were made from the "Robert Hoffman" room to phone number 212-347-2196. Both men had opened a joint safe deposit box during their stay (200-201, 193-195).

Further investigation revealed that appellant Widman resided at 254-12 74th Avenue (209-210a) and that he had previously applied for an apartment located at 201-15 Jamaica Avenue, Queens, New York using the name of "Robert Hoffman".⁸

⁷ Government Exhibit 4A was a photograph of Murphy taken on July 10, 1974 which sharply contrasted with Government Exhibit 5A taken in December of 1970 (118). At the identification hearing the Court and two witnesses were unable to state with any degree of certainty that the Government Exhibit 5A was a photograph of the man seated at counsel table (S.H. 85-87, 148).

⁸ At trial, the rental agent positively identified the appellant Widman as the man known to her as "Robert Hoffman" (294). Additionally the rental agreement listed as "Robert Hoffman" present address, "254-12 74th Avenue, Glen Oaks" with his "present landlord" his "mother" (282-283). One of the witnesses called by Widman, James Reneghan, also testified that Widman had told him that he had been in Hawaii (448).

At the preliminary stages of the investigation, a photographic spread of seven men containing a blurred photograph of appellant Widman (Government Exhibits 3A-3F, 3C) was shown to bank witnesses Marie Daly (S.H. 51), Barbara Ransom (S.H. 73), Lottie Hoggard (S.H. 118), Joseph Leader (S.H. 147-155) and they all failed to select any photograph as the taller robber. In October, 1974, however, when a new spread with clearer photographs of appellant Widman⁹ (Government Exhibits 1, 1A, 1B) was shown, bank employees, Christina Jonke (30-33; S.H. 15) and Marie Daly (56-57; S.H. 45) selected as the taller, light-haired robber the two photographs of appellant Widman, with varying degrees of certainty. Plinio Medina, the store manager, also selected the two photographs of Widman from this spread as the man in the blue Cadillac who made the remark to the girl on one of the days preceding the robbery (S.H. 167-168).

On December 18, 1974, Agent Carbone participated in the arrest of appellant Widman (216). After Robert Widman received his constitutional warning (217-219), he made several statements to the agents. Mr. Widman falsely denied knowing Thomas Murphy, or anyone who owned a 1965 blue Cadillac. He further falsely stated that he had never been to Hawaii and that he never used the alias "Robert Hoffman." He admitted to living at 254-12 74th Avenue, Queens, New York with his parents, that his telephone number was 347-2196 and that he had been unemployed for about one year, having been previously employed by the O & C Cab Company (219-222).

⁹ This photographic spread consisted of 12 photographs, a front and side photograph for each of six men. Government Exhibits 1 and 1-A are the photographs of Widman and the remaining ten photos were designated Government Exhibit 1-B. This photographic spread as well as Government Exhibits 3-3F will be present in the Court at the time of oral argument.

On December 16, 1974 a line-up consisting of the appellant Murphy and five F.B.I. agents, each wearing moustaches (Government Exhibit 6)¹⁰ was held and all the witnesses present, Lottie Hoggard (179; S.H. 100), Alice DiChiara (134-135; S.H. 217),¹¹ Joseph Leader (S.H. 137-138), and Plinio Medina (S.H. 167) failed to identify Thomas Murphy as the shorter robber.

On January 21, 1975, a line-up consisting of appellant Widman and five agents was conducted (Government Exhibit 2) and bank witnesses Jonke (35; S.H. 17-18), Daly (58; S.H. 46), and DiChiara (110, 150; S.H. 218) identified appellant Widman as the taller robber. Plinio Medina also selected appellant Widman from this line-up as the man in the 1965 blue Cadillac (S.H. 168).

At trial, a crucial part of the Government's case was proof that Government Exhibit 5A, the photograph of appellant Murphy (altered and shown to the jury in the form of Government Exhibits 5G and 5H),¹² identified by three bank witnesses shortly after the robbery was a fair and accurate representation of the appellant Murphy on the date of the robbery, May 9, 1974. Mrs. Viola Kallinikos, a next door neighbor of Thomas Murphy for four or five years, recalled that in April of 1974 the appellant had long hair and a moustache (as in altered Government Exhibits 5G and 5H) (361-363). Mrs. Kallinikos then "took ill" and en-

¹⁰ At the identification hearing the Court commented that he was unable to select Thomas Murphy in the line-up photograph until he was pointed out to him. Judge Mishler further commented that a line-up of "six men exactly alike, almost as if you had a sextuplet" was "unfair to the government" (S.H. 122-124, 237-239).

The placing of moustaches on each one in the line-up tended to make all the men extremely similar in appearance.

¹¹ At this line-up, Mrs. DiChiara selected an agent (No. 5) as resembling the shorter robber (S.H. 217).

¹² See Point I, *infra*.

tered the hospital on April 24, 1974 (363). After she returned from the hospital, Mrs. Kallinikos next recalled seeing Mr. Murphy in July of 1974. At this time he had short hair and a moustache (364) similar to Government Exhibit 4A (366) and its two substituted photographs, Government Exhibits 4G and 4H (371-374). The change of appearance was a "very big difference" but Mrs. Kallinikos had no trouble in recognizing him (378).

The next witness was Gus Kallinikos, husband of Viola. Although he could not recall the exact date that his wife entered the hospital (383), he did recall that for the ten days that she was hospitalized, he began to prepare his garden for the planting of vegetables (383, 386, 393). At this time, while in his garden, he observed his next door neighbor, Tom Murphy. The appellant resembled Government Exhibit 5H with long hair and a moustache (385-386).¹³

Mr. Kallinikos next observed appellant Murphy in July of 1974. At this time, he had no moustache, and shorter hair resembling Government Exhibits 4G and 4H (386-387).¹⁴

¹³ Thus, accepting as true the date given by his wife of April 24, this would mean that Mr. Kallinikos observed the appellant resembling Government Exhibits 5G and 5H at some time between April 24, 1974 and May 4, 1974, a week or less before the bank robbery.

¹⁴ On the defendant's case, Thomas Murphy's mother, Gladys Murphy, testified that as of Easter Sunday, April 14, 1974, her son did not have a moustache or long hair (417-419). Upon cross-examination, Mrs. Murphy did admit, however, that on Easter Sunday his hair was collar length (421-423). Similarly, appellant's brother testified that on April 14, 1974, the appellant was clean shaven which was a very noticeable change in appearance (478-479). He could not recall the length of his hair on that occasion, however (485).

B. The identification testimony

Christina Jonke, Assistant Manager for the Chase Manhattan Bank testified that on May 9, 1974 at approximately 8:30 A.M. a man appeared about 6 or 7 feet in front of her, holding a gun in one hand and a handkerchief in front of his face. He stated: "This is a stickup. Get the vaults open" and ushered her to the vault area. He then told her to open it and when she informed him that the keys to the vault were on her desk, he ushered her back to her desk where she picked up the keys and returned to the vault (24-25; S.H. 6-8, 20). Mrs. Jonke threw her half of the combination and the main vault was opened. The man ordered the guard to pull out all the tellers' buggies and he asked Mrs. Jonke where all the money was kept (25; S.H. 9). She replied that the money was in the time vault and at his demand she threw the time vault combination. When it would not open, the robber demanded the remainder of the money in the tellers' buggies. After Mrs. Jonke informed that he would have to wait for each teller to appear, he placed her in an adjoining safe deposit booth (26-27; S.H.9).

Mrs. Jonke who had directly observed this robber face to face for about one minute (48; S.H. 21) and had a side view of him for two or three times for one or two seconds (S.H. 35) identified him as being six foot one inch tall, about 220 pounds, blond hair with a receding hairline having no hairstyle at all because it was "ruffled as though caught in a windstorm" (24, 42; S.H. 7, 24, 30). He was wearing a brown jacket and trousers, plastic gloves and held a handkerchief with one hand just over his nose with his eyes exposed (24; S.H. 10, 23).¹⁵

Mrs. Jonke received just a "fleeting glimpse" of the back of a second robber whom she described as being shorter, slightly built with dark hair (28-29; S.H. 10).

¹⁵ The lighting in the bank was very good due to the fact that all the lights had already been turned on (28, 105).

At the identification hearing, prior to any questioning about prior photographic identification, Mrs. Jonke was asked to look around the courtroom to see if she could identify the taller robber (S.H. 11). The witness requested that everyone stand up (S.H. 11). After all persons in the courtroom stood, Mrs. Jonke selected the appellant Widman stating that appellant "looks very much like him" (S.H. 12). When Mrs. Jonke requested that appellant Widman say her name for a voice identification,¹⁶ appellant in court said "Jonke" and also "This is a stick up" (S.H. 13-14). Mrs. Jonke responded that "It sounds very much like him" (S.H. 14). At trial, Mrs. Jonke was "fairly certain" that appellant Widman was the taller robber (30, 49). Thereafter Mrs. Jonke testified that on October 21, 1974 the photographic spread, (Government Exhibits 1, 1-A, 1-B) was shown to her¹⁷ and that she was "pretty sure" that the two photos of appellant Widman (Government Exhibits 1 and 1-A) represented the first robber, primarily because of the similarity in the hairline and shape of the face of the man in the photo and of the robber (30, 33, 43; S.H. 15).

On January 21, 1975, Mrs. Jonke was also present at a line-up in the Marshal's office. Mrs. Jonke identified Government Exhibit 2 as a fair and accurate representation of the line-up and further testified that she identified number 4 (appellant Widman) as the first bank robber (35; S.H. 17-18).¹⁸

¹⁶ Mrs. Jonke testified that this robber had given her a number of commands (S.H. 22).

¹⁷ At no time did any F.B.I. Agent indicate to any witness that he believed any robber's photograph was in the spread (57, 113; S.H. 28, 52, 104, 146, 171).

¹⁸ Mrs. Jonke testified at the hearing that she remembered the frame of the taller robber's body size more than anything else (S.H. 29).

The second bank witness, Mrs. Marie Daly, testified that at approximately 8:30 A.M., after she had entered the bank and removed her coat, she suddenly observed one man in front of her with a gun and a second armed man behind another employee (51-52; S.H. 35). She saw the side view of the first robber about eight feet away for about one minute and observed him to be about six feet two, heavyset, about 250 pounds, a high forehead with thinning dirty blond hair that "seemed kind of messed up" (52, 54, 61; S.H. 36, 38, 47, 50). He wore a brown tweed jacket and held a handkerchief with his left hand over his mouth¹⁹ and a gun in his right (53; S.H. 37). The shorter robber appeared to be about five eight or five nine with a slight frame about 170 pounds whom Mrs. Daly saw for about 30 seconds (53; S.H. 36-40). At that point one of the perpetrators announced the holdup and they both led Mrs. Daly into the vault area where they placed her and two other employees in one of the safe deposit booths (53; S.H. 39). Mrs. Daly remained in the booth until the robbers left the bank (S.H. 40).

At the hearing Mrs. Daly was also asked if she could identify the taller robber from a number of people standing in the courtroom (prior to allowing her to review any photographic exhibits) (S.H. 43). Mrs. Daly selected appellant Widman stating that he "looks like he might resemble the robber" (S.H. 44). At trial, Mrs. Daly also identified Widman (54).

As with Mrs. Jonke, Mrs. Daly testified that in October of 1974 she selected the two photographs of appellant Widman (Government Exhibits 1 and 1-A) from the photographic spread of 12 photos as "resembling the taller bank robber" (55-57, 64; S.H. 45) even though she had pre-

¹⁹ The handkerchief did not cover his cheekbones but only as much as his hand could cover (S.H. 38, 49).

viously failed to select him from the photographic spread of smaller photos (Government Exhibits 3A-3F) (S.H. 51).

At the line-up on January 21, 1975 Mrs. Daly also selected appellant Widman as "resembling the taller robber" (58; S.H. 46).²⁰ Mrs. Daly was unable to make any in-court identification on the shorter robber (S.H. 46).

Another bank witness,²¹ Mrs. Barbara Ransom, also testified that shortly after entering the bank, a tall man ordered her to "Get over Here" (71-72; S.H. 61-62). He was a heavyset, tall, about six foot two inches, 180-190 pounds with light brown or blond hair with a receding hairline standing about twelve to fifteen feet away (72-73; S.H. 62, 65). He had a handkerchief over his mouth, covering a part of his nose (S.H. 62-63). Thereafter a shorter robber, initially the same distance away (S.H. 66), stated "Stop your lollygagging and get over here" and he shoved her by the head into the vault area (74; S.H. 63). The shorter man was about five feet seven or eight with a long shag haircut to the shoulders (73-74; S.H. 63). Mrs. Ransom went to the safe deposit booth in the vault area, remaining there with her face to the wall until she was ordered to leave that room and to open her teller's buggy (74-75; S.H. 66). At this time, she saw the shorter robber for about one or two seconds (S.H. 66-67). After she complied with this order, she returned to the safe deposit booth until the robbery terminated (75; S.H. 68).

As with the other witnesses, Mrs. Ransom was first asked to view all standing people in the courtroom to see if she could identify the taller robber (S.H. 68). Mrs.

²⁰ At the hearing, Mrs. Daly testified that what really struck her was the taller robber's hair and bodily frame (62; S.H. 49).

²¹ At the identification hearing another bank employee, Ruth Snorgrass was unable to make any in-court identification (S.H. 59-60) and she was not called to testify at the trial.

Ransom replied that the "fellow there [appellant Widman] would be the taller of the two" (S.H. 68). She did so even though there was a heavyset deputy marshal present in the courtroom (S.H. 74). At trial, she identified appellant Widman, even though there was present in the courtroom a different deputy marshal of the same height and build as the appellant Widman (76-78).

Mrs. Ransom testified that she had never identified any robber from the photographic spreads shown²² to her and that she had never previously attended a line-up (85; S.H. 69). She was also unable to identify anyone in the courtroom as the shorter robber "unless it would be the fellow with the plaid jacket" [appellant Murphy] (S.H. 70, 71).²³

Mrs. Lottie Hoggard, a general clerk, testified that on the morning of the robbery after she was admitted to the bank by the guard, she was immediately confronted by a tall man with a gun who ordered her to go inside the safe deposit booth. She described him as being tall, heavyset, with blondish hair and a handkerchief over his mouth and part of his nose, with his eyes and chin showing (166; S.H. 90-91). Mrs. Hoggard was ordered into the vault

²² Mrs. Ransom was shown the two photographic spreads of appellant Murphy (Government Exhibits 4A-4F and 5A-5F) and failed to select any photograph (S.H. 82). She also stated that she had never been shown Government Exhibits 1A and 1B but recalled viewing the seven man spread (Government Exhibits 3-3F) (S.H. 73). Although Mrs. Ransom never selected appellant Widman's photo from this spread before, at the hearing she identified the spread by the one photograph that she recalled viewing before (a photo of appellant Widman). She stated that her in-court identification was not based upon that photo however (S.H. 73). At trial she recalled viewing Government Exhibits 1, 1A-1B but never made a selection (84-85).

²³ Mrs. Ransom also selected appellant Murphy in court at trial but merely because he was the shorter of the two (79-80, 89).

area with Mrs. Ransom at which time Mrs. Hoggard observed another shorter robber. He was smaller, medium build about five seven or five eight inches tall and about 150 to 165 pounds with collar length dark hair and a moustache (167-168; S.H. 92-93). The shorter man held a handkerchief to his face until he dropped it as he was removing money from the tellers' buggies and placing it into his bag (168, 170; S.H. 93). Mrs. Hoggard observed him from the side about six or seven feet away as he removed the money for about five minutes (S.H. 94, 96). During this time she glanced at his face about twice for a second or two (S.H. 102).

In Court, Mrs. Hoggard was unable to identify the shorter robber (S.H. 97). She testified, however, that when shown Government Exhibits 5A-5F she selected the photograph of the appellant Murphy (Government Exhibit 5A) as "most resembling" the shorter robber because of his hair, moustache and eyes (171, 173, 175; S.H. 97-98, 110, 116).²⁴ She could not identify the photograph of the appellant Murphy in Government Exhibits 4A-4F as the shorter robber (S.H. 98)²⁵ nor was she able to identify anyone at the December line-up which included appellant Murphy (179; S.H. 100). Additionally, Mrs. Hoggard had not previously selected any photographs of the taller robber from Government Exhibits 3-3F or Government Exhibits 1, 1A and 1B (177; S.H. 118).

²⁴ Mrs. Hoggard explained that out of the six photos, she initially sorted out three as most resembling the shorter robber and then she selected appellant Murphy's photograph as looking "more like a robber" (174; S.H. 112-113). The entire process took seconds (S.H. 115).

²⁵ F.B.I. Agent Carbone testified that Government Exhibits 5A-5F were shown to Mrs. Hoggard on May 13, 1974; Government Exhibits 4A-4F some time after July (S.H. 118).

Joseph Leader, bank guard, stated that on the day of the robbery, after he had made his usual rounds in the bank, he heard Ruth Snorgrass scream. As he went towards her, he saw a tall man with a gun in her back marching her to the safe deposit area (247; S.H. 127). This man was heavy, about 6 feet, about 250 pounds, blond or mixed grey "messed-up" hair (248, 249; S.H. 127). He told Leader to "Freeze" and marched Leader to the safe deposit area. As each of the employees rang the bell, Leader was ordered to let them into the bank one by one (249; S.H. 128). Leader went to the door about five or six times with this robber accompanying him each time (251-253; S.H. 129). The first time Leader entered the safe deposit area, he observed a second robber (S.H. 130). He was short, about four or five feet tall, with medium build, long black hair and a very heavy moustache. Leader observed him in the vault area on two occasions after he had returned from answering the door (252, 254; S.H. 130) and on each time observed him for 3 or 4 seconds (S.H. 142-143). The smaller robber began to stack money and at one point Leader observed him without the handkerchief for about two seconds (253-254; S.H. 133-134, 144-145). Finally, Leader opened the door for the two men as they left the bank (254; S.H. 134).

Leader failed to identify either appellant in court (262; S.H. 136, 267). He did recall however that shortly after the robbery in May, 1974 he was shown a photographic spread (Government Exhibits 5A-5F) and he indicated that the photo of Mr. Murphy (Government Exhibit 5A) closely resembled the shorter robber (256-257; S.H. 436-137, 153).²⁸

²⁸ At the time of the photo display on Government Exhibit 5, Mr. Leader informed Agent Carbone that if the photo of Murphy "wasn't the robber, it was close enough to be his twin brother" (S.H. 154).

Mr. Leader was not able to select the shorter robber from any photograph in Government Exhibits 4A-4F however (S.H. 155) or at the Murphy line-up (S.H. 137-138).

Mr. Leader also failed to select anyone as the taller robber from the two Widman spreads, Government Exhibits 3-3F (S.H. 147, 155) and Government Exhibits 1, 1-A, 1B (S.H. 149, 152, 155).

One further bank teller, Alice DiChiara, testified that on the day of the robbery she entered the bank and went to the washroom in the basement of the bank (92; S.H. 176-177). Suddenly, a man came into the washroom and ordered her to "Go upstairs. This is a robbery." The man whose face she saw in the washroom mirror²⁷ had dark hair to his collar, sideburns, was about five feet eight or five feet ten, with a medium build (93; S.H. 177-179). She thought him to be holding a handkerchief in front of his face at this time (S.H. 179).

As ordered, Mrs. DeChiara went upstairs and was herded into the vault area (94; S.H. 179) where she remained with other bank employees from one to three minutes (S.H. 181). At this time the dark haired robber was ordering the tellers to open their buggies (94-95; S.H. 182). When Mrs. DiChiara was eventually ordered to open her buggy, she informed him that she did not have her keys to the buggy since they were downstairs in the washroom (95-96; S.H. 183). Then, Mrs. DiChiara was escorted back to the washroom, this time by another robber (96; S.H. 183). This second individual, viewed from the side from a foot away (S.H. 221), was tall "a big person" about 200 to 250 pounds with light blond hair with a "pompadour" hairstyle or "puff" loose in the front of his forehead (97-99, 108; S.H. 183-184).

²⁷ Mrs. DiChiara testified at trial that "she locked eyes with him" for about one second (93-94).

After she obtained her keys and returned with the taller robber to the vault area, the shorter, dark-haired robber started to open her buggy (99-101; S.H. 186-187). Then the buggy started to tip over, and both Mrs. DiChiara and the robber worked at opening the buggy standing side by side for about half a minute (101; S.H. 193-196). At this point, Mrs. DiChiara noticed, as he turned toward her, that he had dropped his handkerchief and had a wide, full moustache and very cold, black and sharp eyes (104; S.H. 195-197, 212). He kept repeating a "certain word" and was "a little bit nervous, frustrated or angry" (102; S.H. 212).

At the hearing Mrs. DiChiara was unable to make an in-court identification of Thomas Murphy as the shorter robber but did select Government Exhibit 5-A (and altered Exhibits 5G and 5H) as a photograph of a man that most resembled²⁸ the dark haired robber²⁹ because of his hair-style, moustache and the "very penetrating eyes" (113-116, 152-153; S.H. 188-192).

She also testified that at the Murphy line-up she selected an individual other than the appellant Murphy (No. 5) as resembling the shorter robber (134-135; S.H. 217)³⁰ but stated at the time that this individual weighed more than the robber and had a fuller face (149; S.H. 220).

²⁸ Mrs. DiChiara could not recall if she had viewed all the photographs in Government Exhibits 5A-5F but did remember viewing the one photograph of appellant Murphy, Government Exhibit 5A (S.H. 188). She could not specifically recall if she had selected 5-A previously or not, but stated "that's the person" (S.H. 191, 213).

²⁹ Although she could not say with a strong degree of certainty that Government Exhibit 5A was the shorter robber, she did say so with a "reasonable degree of certainty" (S.H. 216).

³⁰ A viewing of No. 5 (an agent) and No. 2 will reveal the strikingly close resemblance between them (Government Exhibit 6). The photograph will be present in Court at the time of the oral argument.

Mrs. DiChiara did testify that, at the Widman line-up, she selected the appellant as the taller robber because of his body size and a "puffy piece of hair" (110, 150; S.H. 218) and she was able to make an in-court identification (with a reasonable degree of certainty) of Widman as the taller robber (106-107; S.H. 219). She was not able to select any individual from Government Exhibits 3-3F (S.H. 224) or from Government Exhibits 1, 1A, 1B (144-147).

Plinio Medina, manager of the Met Food Store, observed a blue Cadillac parked directly across the street from the bank three consecutive days before the robbery at about 7:45 to 8:00 A.M. (287-288; S.H. 159, 163-164). He observed three men in the car, one of whom made a remark to a girl Medina had driven to work on the first day (287; S.H. 159-160). Medina observed this man to be heavysset with blonde hair in an "old fashioned style" with hair pulled back on the side and a curl in the front (S.H. 161). On the second day, May 7, 1974, Medina noticed the license plate ending in the last three letters SSF preceded by 511 or some other number ending in a dual numeral (290-291; S.H. 163).

At the hearing, Medina recalled having seen Government Exhibits 5A-5F shortly after the robbery but could not recall if he had selected 5B or 5F as most resembling one of the fellows in the blue Cadillac (S.H. 166).³¹ He also failed to select anyone from the Murphy line-up or appellant Murphy in court as present in the car (292; S.H. 167).

He did select however, Government Exhibit 3-C from one photographic spread (S.H. 172) and Exhibits 1 and 1A of Robert Widman from the 12 picture spread as the

³¹ It was stipulated that Mr. Medina was shown Government Exhibits 4A-4F and did not identify Thomas Murphy as being in the car (S.H. 175).

man who most resembled the man in the car that had made the remark to the girl (S.H. 167-168). He also identified appellant Widman at the line-up (S.H. 168) and in court (291-292; S.H. 174-175).³²

Subsequent to the hearing, the Court made findings that the in-court identification of Jonke, Daly, Ransom, DiChiara and Medina were admissible and were based upon what the witnesses observed at the time of the robbery or in the street the three days prior to the robbery. The Court also found that the identification procedures were fair and not suggestive (S.H. at 198-233).

The Court also stated its reasons for allowing the identification testimony:

You know, identification is not only [what] the eyes looked like, the nose looked like, the shape of the face. I know this is typical, routine cross-examination, but what was it about this defendant that you recognized? Was it the ear? Was it his hair? Was it the eyes? Was it the nose? The way his mouth curled, his moustache, nonsense. You know that you can see somebody from blocks away just in the way it might not be a terribly distinctive way and you'll see that's Joe Smith coming down. You haven't seen the eyes or the nose, but you know that's Joe Smith. Sometimes it's the way someone stands.

Now, sometimes something that you and I cannot analyze, it's the whole composition, shape of the face, the eyes, the nose, the way the lips curl, the shape of the face, sometimes high cheekbones, oval face, moon-shaped, square, receding chin and you look at the fellow. You say "sure, I've seen him

³² Mr. Medina stated that although he was "not 100 percent sure," Widman "resemble[d] a lot like that man" (295).

before". Take it apart and you'll say "his eyes look like everyone else's. His nose looks like a million other people, mouth like ten million other people", but the combination of all is what identification is all about *Id.*, at 237-238.³³

At another portion in the hearing the Court commented, "We know the risk and we know the uncertainty of identification testimony, but it's been overstated like all these propositions. Identification testimony is of doubtful value. . . . It's the weakest of all the testimony that we know of, but we have to see the specific case" (S.H. 242).

Furthermore, the Court allowed the prior photographic identification of appellant Murphy from a 1970 photograph (Government Exhibit 5A) in the interest of justice because he had "successfully so altered his features so that even if he were the robber, he has made it almost impossible for anyone to pick him out in Court" (S.H. 236).

At the close of the trial, the Court, citing *United States v. Evans*, 484 F.2d 1178 (2d Cir. 1973), gave the following instruction on the identification testimony:

Now, I want to make sure that the issue is properly phrased. The Government must prove beyond a reasonable doubt that the accused who you find to be guilty of the crime was present at the bank. And the Government must prove that beyond a reasonable doubt. The Government doesn't necessarily have to prove beyond a reasonable doubt that any particular witness identified the accused or

³³ This explanation by the Court as to the reason for its decision on the admissibility of the identification testimony is a far more accurate exposition on the Court's reasoning process than the "duck is a duck" quote in Appellant Widman's Brief (13, 26).

either of them as the person present in the bank. Identification testimony is some of the proof that the Government offered—the main proof that the Government offered—and I am talking about identification testimony given by all of the bank witnesses—but there is other proof in the case. When I say there is other proof in the case, I am not indicating that you should credit or believe it. I just want to point it out to you.

Turning to identification testimony:

The evidence in the case includes testimony by Alice DiChiara, Lottie Hoggard, and Joseph Leader, on a prior photographic identification from a spread or spreads of photographs. There has been in-court identification of Mr. Widman by—and I shouldn't say identification. I should say there is some testimony given by Christina Jonke, Marie Daly, Barbara Ransom and Plenio Medina in Court where the witnesses pointed out with varying degrees of certainty that the defendant Robert Widman was the taller of the bank robbers.

There has also been prior photographic identification by Mrs. Jonke and Mrs. Daly of the defendant Robert Widman as the taller bank robber.

There has been testimony—and I can't recall the witness that identified the defendant Robert Widman in the lineup. There is also testimony of the witnesses—and I don't recall who—of the failure to identify the defendant Murphy in the lineup. And I think there is some testimony of one or more witnesses that failed to identify the defendant Widman in the lineup.

Identification testimony must be received with caution and scrutinized with great care. Identification testimony is an expression of belief by the wit-

ness of what the witness saw at the time of the crime. The question that should be uppermost in your mind is whether when the witness selected a picture from a spread, selected an individual from a lineup, or made an in-court identification, whether that was the impression that remained in her mind or his mind from what he or she saw at the time—

—as far as the bank employees are concerned, at the time of the robbery, as far as Mr. Medina is concerned, at the time he walked along the street and said he saw an individual in the blue 1965 Cadillac. And that such testimony is not given from any suggestion either through the manner the spread was offered or the lineup was made.

In appraising the identification testimony of the witness, you should consider the following:

One, whether the witness had the capacity and the adequate opportunity to observe the perpetrator or perpetrators.

This will depend on all the circumstances at the time the witness observed the perpetrator or offenders.

Take into consideration how long or how short a time the witness saw the offender, or how far or how close the witness was to the offender, the lighting conditions at the time, the position from which the witnesses viewed the offender, the emotional state of the witness at the time. Would someone be inclined to be confused, or would it sharpen the witness' view and recollection of the offender.

Take into consideration the strength of the identification. Was the witness absolutely sure or absolutely certain, reasonably certain, or in such a serious doubt as to the resemblance to the offender that the identification would be worthless.

Scrutinize all the circumstances under which the identification was made prior to trial.

If the identification was through the spread of photographs, take into consideration when the identification was made, how soon after the crime. Take into consideration whether the witness selected a photograph from a spread.

In this case, the testimony is that it was a spread of 6. Well, look at the photographs. Was it a fair sampling? Is it the kind of selection someone would make from all these photographs if the impression came at the time of the robbery? Were the photographs similar enough so that someone who hadn't seen the perpetrator, or no impression was made, would have picked the defendant as the perpetrator?

Was it the type of spread that in all likelihood only someone who would have seen the perpetrator would have picked the defendant as the perpetrator? The lineup identification procedure, you determine whether it was fair. Were the men selected similar enough so that someone who had seen the perpetrator at the time of the crime would have picked the perpetrator out?

Was it the kind that was unfair so that anyone without even having seen the perpetrator, would have picked that individual out?

Take into consideration the fact that if more than one witness may have selected a defendant as a perpetrator, does not necessarily mean that if two picked the defendant out as the perpetrator of the crime that two is necessarily any greater than one. Use your common sense in determining for yourself, based on how the witnesses testified, as to whether collectively all of the testimony brings you to the conclusion that the Government proved that the accused

was present at the bank. Take into consideration the failure of the witnesses to make a selection (474, 593-598).

ARGUMENT

POINT I

Government's Exhibits 5G and 5H, shown to the jury, did not violate appellant Murphy's right to a fair trial.

Appellant Murphy contends that the admission into evidence of Government Exhibits 5G and 5H (as well as the in-court "display" of Government Exhibit 5A)³⁴ denied him his fifth amendment right to a fair trial because each exhibit was an altered "mug shot" that informed the jury of a prior criminal record.³⁵ *United States v. Harrington*, 490 F.2d 487 (2d Cir. 1973).

There is no doubt that subtle attempts to prejudice a defendant by the use of "mug shots" which on their face evidence a prior criminal record have been severely sanctioned. *United States v. Harrington*, *supra*, 490 F.2d at 490-496; *United States v. Barnes*, 365 F.2d 509, 510-512

³⁴ The admissibility, not challenged here, of the witnesses' prior identifications of both defendants from photographic spreads is clearly authorized in this circuit. See *United States v. Miller*, 381 F.2d 529, 538 (2d Cir. 1967); *United States v. Forzano*, 190 F.2d 687, 689 (2d Cir. 1951); *United States v. Sacasas*, 381 F.2d 451, 454 (2d Cir. 1967); *United States v. Abbate*, 451 F.2d 990 (2d Cir. 1971); *United States v. DeSena*, 490 F.2d 692 (2d Cir. 1973); accord, *Clemmons v. United States*, 408 F.2d 1230, 1243 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 964 (1969). See also, *Gilbert v. California*, 388 U.S. 263, 272-273 n.3 (1967); and 4 WIGMORE, EVIDENCE (3d Ed. 1940) § 1130 and cases cited therein.

³⁵ Appellant Murphy did not take the stand or offer evidence as to his reputation for honesty.

(D.C. Cir. 1966); *United States v. Harmon*, 349 F.2d 316, 319-322 (4th Cir. 1965); *United States v. Reed*, 376 F.2d 226, 228-229 (7th Cir. 1967). The Court in *Harrington*, however, also recognized the "undeniable importance" of the use of "mug shots" to identify criminals in the initial stages of the investigation. *Id.* at 491. To balance the countervailing interests in ruling on the admissibility of "mug shot" evidence, *Harrington* formulated a three-prong test (490 F.2d at 494-495):

(1) The Government must have a demonstrable need to introduce the photographs;

(2) The photographs themselves, if shown to the jury, must not imply that the defendant has a prior criminal record; and

(3) The manner of introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs.

There is little dispute that the Government had demonstrated a need to allow Government Exhibits 5G and 5H alone and with the rest of the spread. The pre-trial and in-court photographic identifications were the sole identification testimony against Mr. Murphy due to his radical change of appearance.

Secondly, photographs 5G and 5H, which had been altered in the absence of the jury, could in no way imply that the defendant had a prior criminal record. Prior to the alteration, Government Exhibits 5A through 5F had been shown to Mrs. DiChiara in the presence of the jury (111-116). At this point, all the photographs (which were in fact "mug shots") in the spread had an adhesive tape marked "Evidence" on the lower portion which covered any and all identifying numbers. *Cf. United States v. DeSena*, *supra*, 490 F.2d at 696 (2d Cir. 1973); *United States v. Calarco*, 424 F.2d 657, 660-661 (2d Cir.), *cert. denied*, 400

U.S. 824 (1970). In the absence of the jury, the Court then ordered that the bottom portion of Government Exhibit 5A be cut off or that a new photograph be substituted for it. (117-119). Over the objection of the Government³⁶ the Court further ordered that the substituted photograph be cut in half to avoid any prejudice due to its juxtaposed front-view and profile format (119-122).³⁷

Thus, not only were the Government Exhibits 5G and 5H meticulously altered to avoid any unfair inferences by the jury, but the original Exhibit 5A (not displayed to the Court but handed to Mrs. DiChiara) was also free of identifying characteristics and each photograph of the appellant met the second requirement of *Harrington*.

Finally, the method of the introduction at trial in no way alerted the jury as to the origins of the photograph. The entire process of alteration occurred while the jury had been excused from the courtroom (116-126). Cf. *Harrington*, *supra*, 490 F.2d at 489. The defense counsel was

³⁶ The Government's objection to severing the photograph was on the grounds that the witnesses' testimony about their previous ability to select the appellant from a photographic spread of similar type photographs would be diminished if the jury were led to believe that they selected two dissimilar photographs of the appellant from the rest of the spread. To cure any prejudice from the juxtaposed photograph, the Government proposed that the jury be instructed that Government Exhibit 5A was an army photograph (120). The Court rejected this proposal (120).

³⁷ At the identification hearing, appellant's principal objection to the introduction of Government Exhibit 5A was an alleged lack of authenticity. Counsel for Murphy, Harold Borg, objected to this photograph as suggesting a prior criminal record only when the Government offered to prove its authenticity by means of calling the police photographer (S.H. 230-244). Even at the trial, Mr. Borg pressed its exclusion on the grounds of a lack of authenticity and it was the Court rather than counsel that first proposed a further alteration of Government Exhibit 5A (116-117). Even after the Court's alteration into Exhibits 5G and 5H, Mr. Borg objected to their admission proposing that the jury would compare 5G and 5H with each other and infer a criminal record (122-123). He offered no alternate curative method.

well aware of the Government's intent to offer these exhibits and of their condition from the testimony and statements made by the Government at the suppression hearing. *Cf. Barnes, supra*, 365 F.2d at 511 n.5. No mention was ever made of the word "mug shot" or of any prior connection of Murphy with the police. *Cf. Reed, supra*, 376 F.2d at 227. Rather than attempting to unfairly prejudice the defendant, the Government went so far as to propose the fiction that 5A was an army photograph, to finally cure any possibility of the jury's speculation that this was a police photograph. Unlike the statement in appellant's brief,³⁸ there was nothing in the Government's actions in handing to Mrs. DiChiara the photographic spread (Government Exhibits 5A-5F) nor in her viewing them and selecting appellant's photograph (Government Exhibit 5A) to alert the jury as to the nature of photographs (111-116).

Thus the admission into evidence of Government Exhibits 5G and 5H did not violate appellant Murphy's right to a fair trial and did not constitute error.³⁹

³⁸ Appellant argues that the government's manner in handing this spread to Mrs. DiChiara was done "blatantly and in open view of the jury" (Brief for Appellant Murphy at 9). On the contrary, these relatively small photographs were spread out on the witness table by Mrs. DiChiara and she merely pointed to Government Exhibit 5A. She never held up or displayed these photos to the jury and Government Exhibit 5A was never seen by the jury.

³⁹ Appellant Murphy also argues that the witnesses' "limited opportunity" to observe the shorter robber created a substantial likelihood of misidentification in selecting Exhibit 5 from that photo spread (Brief for Appellant Murphy at 11). He does not charge, however, that this spread, Government Exhibits 5A-5F, was in any way suggestive and a viewing by this Court of Exhibits 5A-5F will demonstrate that this spread of six young moustached men was extremely fair. Without any claim of a constitutionally suggestive spread, the witnesses' testimony based upon personal observations as to identification is clearly competent, and a question of fact for the jury. *United States v. Evans*, 484 F.2d 1178, 1181-1182 (2d Cir. 1973). See Point III, *infra*, at 29.

POINT II

Evidence of appellant Murphy's dominion over the 1965 Cadillac and his Hawaiian vacation was properly allowed.

Appellant Murphy also alleges as error the admission into evidence of his admissions on the ownership of the 1965 Cadillac and of his statements and other corroborative evidence of his trip to Honolulu while unemployed. It is argued that this evidence was "highly speculative and prejudicial" tending to confuse the issues and mislead the jury.

It is settled that the task of weighing possible unfair prejudice against its probative value lies with the sound discretion of the trial judge. Once the record indicates that the trial judge considered all the dangers of admission, however, his determination should rarely be disturbed on appeal. *United States v. Fisher*, 455 F.2d 1101, 1104 (2d Cir. 1972); *United States v. Ravich*, 421 F.2d 1196, 1205 (2d Cir.), *cert. denied*, 400 U.S. 834 (1970).

Here there is no doubt that the Court considered all this evidence before admitting it and correctly ruled it to be probative on the issues. At the suppression hearing, appellant objected to the admission of all of Murphy's statements on the grounds that (1) they were the product of governmental force and (2) they were "incriminatory" when linked with Medina's testimony about the car. The Court found that *Miranda* was fully complied with and the statements were voluntarily given (S.H. 305-307). Implicit in this ruling was the Court's finding that appellant's admission and Medina's testimony on the car were highly probative on the issue of appellant Murphy's participation in the casing operations at the bank for the three days prior to the robbery. Rather than confusing the jurors, it corroborated the photo identification of the appellant

by the three bank witnesses as being the shorter robber by allowing the jury to infer that he also cased the bank prior to the robbery. Thus, the appellant's admissions on the exclusive use of the car used in casing the bank and Medina's testimony on this were properly admitted into evidence.

Similarly, the District Court considered the proposed evidence on appellant's Hawaiian and Bahamian vacation and properly ruled it admissible as tending to prove that the appellant's recent acquisition of wealth was the bank robbery proceeds (182, 339). *United States v. Fisher, supra* at 1103-1104; *United States v. Ravich, supra* at 1204; *United States v. Trudo*, 449 F.2d 649, 651 (2d Cir. 1971), *cert. denied*, 405 U.S. 926 (1972).

In all, each item of evidence was properly allowed into evidence.⁴⁰

POINT III

The in-court identification of appellant Widman was not based on impermissible pre-trial procedures.

Appellant Widman argues that the in-court identification of him was based upon a constitutionally impermissible pre-trial line-up and a photographic spread that unfairly highlighted one of his characteristics, the "pompadour" hair style. Counsel further seeks to create an

⁴⁰ Appellant Murphy also argued as error the Court's charging on "consciousness of guilt" (Brief for Appellant Murphy at 13). Judge Mishler's instructions in this regard, however, specifically referred to the false statements of co-defendant Widman, not Mr. Murphy (583-585). The Government did not attempt to use appellant Murphy's statements as fabrications evidencing a guilty mind but rather as the truth, which corroborated the other evidence as to Mr. Murphy's dominion over the Cadillac and his recent acquisition of wealth.

evidentiary rule of competency of eye-witness testimony based on a quantum of observation and certainty of identification apart from any impermissible suggestive procedures ⁴¹ (Brief for Appellant Widman at 24).

At the outset, it should be noted that in the absence of an impermissible pre-trial procedure, the degree of certainty of an identification and the extent of the witnesses' observation is a question of fact for the jury and not of admissibility. *United States v. Evans*, 484 F.2d 1178, 1181-1182 (2d Cir. 1973); *United States v. Messina*, 507 F.2d 73, 76-77 (2d Cir. 1974). Most of the cases cited by the appellant requiring degrees of accuracy in observation are premised upon a finding or an assumed finding of an impermissibly suggestive pre-trial identification procedure. *Neil v. Biggers*, 409 U.S. 188, 198 (1972) (suggestive "show-up"); *United States v. Yanishefsky*, 500 F.2d 1327, 1330 (2d Cir. 1974) (presumptively suggestive photo spread); *United States ex rel. Phipps v. Follette*, 428 F.2d 912, 913 (2d Cir.), *cert. denied*, 400 U.S. 908 (1970) (station house show-up), and *United States v. Reid*, — F.2d —, Slip op. 3073, 3097 (2d Cir., April 24, 1975) (suggestive one-photo identification).⁴² Here, the government, cognizant of the potential identification problems, made every effort to insure that all the photographs

⁴¹ For a similar contention which was rejected, see *United States v. Evans*, 484 F.2d 1178, 1179 n.1 (2d Cir. 1973).

⁴² Similarly, *Fernandez II*, cited by the appellant, did not weigh the accuracy of the observations and the certainty in identification testimony for the purpose of determining its admissibility at trial, but rather in weighing the effect of judicial intervention as a standard of reversal at the appellate level. *United States v. Fernandez II*, 480 F.2d 726, 736 (2d Cir. 1973).

shown and all line-ups conducted were free from any suggestive factors.⁴³

A viewing of the 12 photographs shown in October, 1974 (Government Exhibits 1, 1A, 1B) will illustrate that there was nothing in these exhibits that unfairly suggested appellant Widman as being the taller robber. Each of these exhibits portrays a light-haired tall man with a receding hairline⁴⁴ who generally matches the descriptions given by the witnesses to the robbery.⁴⁵

⁴³ It should be noted that although the government had no obligation to provide line-ups for either appellant, they did so upon appellants' requests. At no time were any of the line-up photos or any photographic spreads shown to the witnesses for trial preparation, to insure freedom from reliance upon the photos. Cf. *United States v. Reid*, *supra* at 3097 n.16. This is obvious from the testimony of Mr. Medina (S.H. 166), Mrs. Ransom (84-85; S.H. 70) and Mrs. DiChiara (191-213; S.H. 188). Indeed, the government was somewhat prejudice by this failure to show these spreads prior to trial. Although not reflected in the transcript, Mr. Medina had identified the appellant Murphy in Government Exhibit 5A in May of 1974 as one of the men casing the bank but not at trial.

Additionally, there was no evidence of corroboration among the witnesses about their prior identification. Cf. *Messina v. United States*, 507 F.2d 73, 76 (2d Cir. 1974).

⁴⁴ The only distinguishing characteristic in Government Exhibits 1 and 1A from the others in 1B is a facial blemish. No witness recalled seeing a blemish, however, and no one selected this photo on those grounds (45, 61).

⁴⁵ In fact Government Exhibits 1, 1A, 1B have in fact fewer dissimilarities than Government Exhibits 3-3F where three men clearly have black hair (3B, 3D, 3F) and one man is exceedingly obese (3F). Appellant does not argue that Government Exhibits 3 to 3F were suggestive however, since no witness was able to select appellant Widman's photo (Government Exhibit 3C) from this spread. Although the appellant's hair style was the same in Government Exhibit 3C as in Government Exhibits 1 and 1A, the witnesses failed to select the appellant from the smaller photographic spread due to the blurred quality of these photos.

Equally so, an examination of the line-up photo (Government Exhibit 2) demonstrates that this line-up did not impermissibly suggest appellant Widman (No. 4) as the taller robber. Although two men in this line-up were shorter than appellant, two others were taller. There was nothing unique about appellant's build that unfairly drew attention to him. While appellant's hair style was somewhat dissimilar from those of other members of the line-up, there was nothing in this style that was so unusual as to attract undue attention or to trigger a misidentification because of it. Furthermore, there is no requirement that an accused must be surrounded by people nearly identical in appearance. *United States v. Reid, supra*, Slip op. at 3097 n. 15.

Nor is it accurate to infer that the witnesses' memory of the taller robber was primarily one of a "pompadour hair style", so that their in-court identification was the product of impermissible pre-trial procedures which suggested this feature.

Mrs. Jonke testified that when she observed the taller robber, he had a receding hairline, but no particular hair style. His hair was "ruffled" (S.H. 7, 24, 30, 42) and not "slicked back" (as it was in Government Exhibits 1 and 1A) (42). When she selected these photographs she did not concentrate on the hair style but on the hairline as well as the shape of his face and eyes (43). Similarly, at the line-up, she concentrated not on a particular hair style but on the hairline, the frame of the body (44), the shape of his face and of his eyes (46).

Mrs. Daly also recalled that the taller robber had "messed up" thinning hair, that covered his ears (52-54, 59; S.H. 36-38, 47, 50), not the hair style depicted in Government Exhibits 1 and 1A. The most prominent feature she recalled about this man was his heavy build (62; S.H. 49). When she viewed the photographs in October, each

photograph had slight differences in hair styles, foreheads and in body frame. Rather than selecting appellant's photograph on the basis of a unique "hair style" (impermissibly suggesting the appellant), she selected this photograph because all of his features matched her recollection of the features of the taller robber that she observed (65). Similarly, Mrs. Daly selected appellant Widman from the line-up because of the composite of his personal characteristics even though the line-up contained other tall and "big" men (67).

Only Mrs. DiChiara recalled a "puff" or "pompadour" hairstyle on the taller robber (S.H. 183-184). She was not able to identify appellant's allegedly suggestive photographs (Government Exhibits 1 and 1A) on this basis, however, (144-147).⁴⁶

Equally so, at the Widman line-up, Mrs. DiChiara selected the appellant because his bodily frame and hair most closely matched her memory of the robber's appearance (145-147). The fact that no other member of the line-up had as many of the personal characteristics of the robber as the appellant may be due to the fact that appellant was in fact the robber and not a victim of a prejudicial line-up.

The fairness of this spread is also attested to by the fact that Mrs. Ransom (84-85), Lottie Hoggard (177; S.H. 118), and Joseph Leader (S.H. 149, 152, 155) never selected appellant's photo when shown Government Exhibits 1, 1A and 1B, although they gave similar accounts as to the robber's hair and build. Mrs. Ransom, who provided an identification (although admittedly less than positive) of appellant Widman at the hearing and trial did not select

⁴⁶ Mrs. DiChiara was never asked if she would define as a "puff" or "pompadour", the hairstyle of appellant in Government Exhibits 1 and 1A.

Mr. Widman from the allegedly improper photographic spread or line-up (76-78; S.H. 74). Thus there was nothing impermissibly suggestive in either the photographic spread or the line-up that would warrant a further finding as to the degree of accuracy of the witnesses' observations. Furthermore, while the observations of the witnesses were limited by the handkerchief, there is no testimony on record to evidence that their observations of certain portions of his face and all of his body structure were in any way dependent upon the prior out of court procedures. The varying degrees of certainty attested to by the witnesses did not stem from a faulty memory or an inability to see those features unobstructed by the handkerchief. It arose because of this partial covering over the nose and mouth. Thus, the in-court identifications of appellant Widman were based upon the witnesses' independent recollections of the composite of their personal observations of portions of the appellant's face and all of his bodily frame so that they were capable of identifying him to the extent that they indicated. Both counsel had a full opportunity to probe the witnesses' uncertainty upon cross-examination. Thus, the in-court identifications were in no way the product of any prior identification and this testimony was properly admitted to be given whatever weight and credence the jury deemed appropriate.⁴⁷ Accordingly, the judgment of conviction should be affirmed.

⁴⁷ Additional evidence connecting the defendant with the crime may be also considered on the issue of whether there was a substantial likelihood of misidentification. *United States v. Reid*, *supra* at 3099-3100 and cases cited therein. Here, the government has the additional evidence of the defendant's recent acquisition of wealth, the use of an alias on the trip to Hawaii, his association with Murphy and all of his false exculpatory statements.

CONCLUSION

The judgment of conviction should be affirmed.

June 18, 1975

Respectfully submitted,

DAVID G. TRAGER,
*United States Attorney,
Eastern District of New York.*

PAUL B. BERGMAN,
JOAN S. O'BRIEN,
*Assistant United States Attorneys,
Of Counsel.*⁴⁸

⁴⁸ The United States Attorney's Office wishes to acknowledge the assistance of Robert C. Barber in the preparation of this brief. Mr. Barber is a third year law student at Boston University School of Law.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

-----EVELYN COHEN-----, being duly sworn, says that on the 20th
day of June, 1975, I deposited in Mail Chute Drop for mailing in the
U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and
State of New York, a BRIEF FOR APPELLEE
of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper
directed to the person hereinafter named, at the place and address stated below:

Harold Borg, Esq.
123-60 83rd Ave.
Kew Gardens, N.Y. 11415

William J. Gallagher
Legal Aid Society
Federal Defender Services Unit
509 U.S. Courthouse
Foley Square, N.Y. 10007

Sworn to before me this
20th day of June
1975

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County

Evelyn Cohen

PLEASE TAKE NOTICE that the within will be presented for settlement and signature to the Clerk of the United States District Court in his office at the U. S. Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the ____ day of _____, 19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,
-----, 19-----

To:

Attorney for

PLEASE TAKE NOTICE that the within
is a true copy of _____ duly entered
herein on the ____ day of _____
_____, in the office of the Clerk of
the U. S. District Court for the Eastern Dis-
trict of New York,
Dated: Brooklyn, New York,

To:

Attorney for

No.

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ is hereby admitted.

Dated: _____, 19____

Attorney for